

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

TIMOTHY A. CARL,

Plaintiff,

vs.

Civil Case No. 1:11-cv-94

Honorable Robert J. Jonker  
U.S. District Judge

MUSKEGON COUNTY;  
MARK BURNS;  
TODD GILCHRIST;  
THERESA JONES-BURTON;  
BRIAN BONSTELL;  
CHRISTY BOWEN;  
STEVE WEINERT;  
KATHERINE JAWOR;  
CORRECTIONS OFFICER DARRYL HAIRSTON;  
CORRECTIONS OFFICER J. CERKA;  
CORRECTIONS OFFICER R. TOPP;  
CORRECTIONS OFFICER S. SMITH;  
DEAN ROESLER, INDIVIDUALLY AND IN HIS  
OFFICIAL CAPACITY AS THE SHERIFF OF  
MUSKEGON COUNTY AND THE MUSKEGON  
COUNTY JAIL; AND COMMUNITY MENTAL  
HEALTH SERVICES OF MUSKEGON COUNTY,  
A DEPARTMENT OF THE COUNTY OF MUSKEGON,

Defendants.

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**MUSKEGON COUNTY DEFENDANT'S BRIEF IN OPPOSITION  
TO THE PLAINTIFF'S MOTION FOR RULE 16 SANCTIONS**

**INTRODUCTION**

The basis of the Plaintiff's Motion is the cancellation and rescheduling of two depositions among the many that have been taken in this case. The cancellations were inadvertent and at no cost to the Plaintiff. Moreover, of the two depositions at issue, the deposition of Officer Port has been taken and the deposition of Nurse William Yonker has been scheduled.

**FACTUAL BACKGROUND**

There is no dispute that this case has presented scheduling challenges not only for these County Defendants, but for all of the parties. These County Defendants carry the additional burden of doing so as to not affect the security of the Muskegon County Jail. This is especially true in the case of Officer Port. Deposition dates were scheduled initially in December as follows:

1. William Yonker – December 16, 2011
2. Officer Port – December 27, 2011

It should be noted that William Yonker was formerly the Jail nurse and is now retired. The fact that he is retired and travels extensively adds a layer of complication to the scheduling in this case, that the defense counsel cannot control.

Plaintiff's attorney was notified by e-mail on Friday, December 9, 2011, that Officer Port would not be available for her December 28, 2011 deposition. Please see the attached e-mail, identified as Exhibit 1.

The defense counsel, who had maintained contact with Nurse Yonker, underwent serious surgery on December 1, 2011, and because of complications, was on a medical leave for the entire month of December. This fact also added to scheduling issues.

At the same time, defense counsel, despite the repeated efforts of others in his office, could not confirm when Nurse Yonker would be available for the taking of his deposition. The deposition of Nurse Yonker was scheduled for December 16, 2012. It was cancelled, but the deposition of another witness, Sgt. Woods, was taken in its place.

Nurse Yonker's deposition was rescheduled for Monday, February 27, 2012. Defense counsel was contacted by Nurse Yonker on Friday, February 24, 2012, advising that he could not attend the scheduled deposition. Defense counsel immediately advised Plaintiff's counsel by e-mail of this development. The deposition of Nurse Yonker has now been rescheduled for March 23, 2012, and that date has been confirmed with the witness.

As to the deposition of Officer Port, as mentioned above, it was scheduled for Thursday, February 23, 2012. The date of the deposition, however, was not passed on to her by the Jail Administration. On February 23, 2012, defense counsel attempted to produce Officer Port, without notice, for the scheduled deposition. He was advised through her shift commander, that the Jail was already short staffed due to illness, vacations, and injuries to other personnel.

Further, that to release her at that time would pose a security issue for the Jail. It was on that basis that the decision was made by defense counsel not to have her appear at the deposition. At any rate, however, that deposition was rescheduled and taken on February 29, 2012.

### **ARGUMENT**

Under Rule 16(f)(C), a Court may enter any just order if the party: “(C) fails to obey a Scheduling Order or any other Pretrial Order.” In this case, Plaintiff’s counsel complains of scheduling frustrations. He, however, has no appreciation of the many hours devoted to the scheduling of the many depositions that have been taken, in addition to those that have been cancelled. As to the two depositions at issues, the deposition of Officer Port has been taken and the deposition of Nurse Yonker has been rescheduled. What Plaintiff’s counsel fails to appreciate is that despite the good faith efforts of all, discovery scheduling problems can arise. The probability of scheduling problems is increased exponentially when it involves multiple defendants represented by multiple counsel. That issue is further complicated when, as here, many of the witnesses have security responsibilities. Quite frankly, there is nothing more that defense counsel could have done with regard to Nurse Yonker other than to physically restrain him and bring him to the deposition. Nothing more that could have been done with Officer Port other than to demand, on the date that her deposition was scheduled, that she abandon her security post at the Muskegon County Jail. When viewed in the light of reality, both alternatives are unreasonable.

The fact is that there was nothing that defense counsel could do. Further, it is grudgingly accepted that the ability to control a witness, particularly one who is retired, is limited. A close reading of Rule 16(f) supports the view that its application was intended for intentional behavior on the part of a party or attorney.

A review of the case law in this case makes it clear that the analysis and application of this Rule is done on a case by case basis and is within the sound discretion of the Court. No bright line can be found for its application.

**PRAYER FOR RELIEF**

It is respectfully submitted that despite the scheduling difficulties, there has been no prejudice to the Plaintiff to warrant the imposition of sanctions.

Dated: March 9, 2012

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